

Stier v One Bryant Park LLC

2011 NY Slip Op 32284(U)

August 25, 2011

Supreme Court, New York County

Docket Number: 103134/09

Judge: Louis B. York

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SCANNED ON 8/24/2011

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C.

PART 2

Index Number : 103134/2009

STIER, CHRIS

vs
ONE BRYANT PARK

Sequence Number : 001

COMPEL

INDEX NO. 103134/09

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED WITH ACCOMPANYING
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED

AUG 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/18/11

L. York
LOUIS B. YORK

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X

CHRIS STIER,
Plaintiff,

-against-

ONE BRYANT PARK LLC, ONE BRYANT PARK
DEVELOPMENT PARTNERS LLC, THE DURST
MANAGER LLC and TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK,

Index No.: 103134/09

FILED

Defendants.

-----X

AUG 24 2011

YORK, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this case, plaintiff Chris Stier brought several causes of action against defendants One Bryant Park LLC, One Bryant Park Development Partners LLC, The Durst Manager LLC, and Tishman Construction Corporation of New York, for personal injuries which he sustained on September 2, 2008, when he allegedly tripped and fell while he was working on a construction project. Motion sequence numbers 001 and 002 have been consolidated for disposition.

In motion sequence 001, plaintiff moves to compel a further deposition of Mark Price, a witness for defendant Tishman Construction Corporation of New York. On June 9, 2010, Mitchell Kahn, Esq., an attorney who was retained by plaintiff's counsel, deposed Mr. Price. Plaintiff had hired Diamond Reporting to prepare a written transcript of the proceeding. Counsel for plaintiff was advised, that due to a mechanical error, large portions of the transcript had been lost. Plaintiff submits a sworn statement, dated February 22, 2011, from Lesley Simpson, the reporter who was transcribing the deposition. Ms. Simpson states that due to an error caused by a corroded disk, large portions of the testimony were lost, and were unable to be recovered.

Mr. Kahn reviewed the existing portion of the transcript and confirmed that large

portions of the testimony are missing. Mr. Kahn submits an affidavit in which he states that the following information discussed at Mr. Price's deposition are not included in the transcript:

- all of the witness' background, work history and pedigree;
- all of the preliminary questions and answers about the building project;
- all of the questions and answers concerning the construction contracts;
- all of the questions and answers about the various defendants' roles in the project, including their supervision and control of the work and the accident site;
- all of the questions and answers concerning the stage of the work on the date of the accident;
- all of the questions and answers concerning the photographs of the accident site;
- all of the questions and answers concerning the defective conditions at the accident site;
- all of the questions and answers concerning the various Industrial Code violations at the accident site;
- all of the questions and answers concerning the accident itself, the reports made of the accident and any witness to the accident.

(Dolan Affirm., ex. D). Plaintiff's counsel maintains that plaintiff would be unfairly prejudiced without the missing portions of Mr. Price's testimony, and that a further deposition is necessary.

Defendants argue that it would be prejudicial to produce Mr. Price a second time, because other defendants have been questioned and additional discovery has been exchanged.

Defendants contend that it is unclear how Mr. Kahn recalled the various missing subjects of the initial deposition, that plaintiff waited over seven months to advise defendants about the missing portions of the transcript, and that the majority of the subjects which plaintiff seeks to further question Mr. Price about, were asked and preserved in the transcript. Defendants request, that if the court find that there are issues which were not included in the transcript, than alternatively, plaintiff should serve interrogatories on Mr. Price.

Glenn P. Dolan, Esq., plaintiff's counsel, submits a reply affirmation, in which he

explains how the subjects discussed by Mr. Kahn were not included in the transcript and affirms, that if permitted, a further deposition of Mr. Price will be limited to only those questions and answers which were asked, but not included in the transcript. Since the missing transcript was due to the mechanical error of the transcribing company, the court will allow a further deposition of Mr. Price, limited to questions which were previously asked and not recorded in the transcript. The deposition must be conducted by September 30, 2011. Before the commencement of this deposition, the court requests that counsel for both parties review the existing deposition transcript so that they are aware as to what questions were previously asked and answered.

In motion sequence 002, defendants move, pursuant to CPLR 3126, to strike plaintiff's complaint for failure to comply with discovery demands for medical authorizations and for wilfully refusing to cooperate with at a vocational rehabilitation examination. Defendants move, pursuant to CPLR 3042 (c), to preclude plaintiff from offering evidence of his injuries at trial due to his failure to comply with the demand for authorizations, and to preclude plaintiff from offering any evidence of lost income as a result of his refusal to cooperate with defendants' vocational rehabilitation expert. Defendants also move, pursuant to CPLR 3124, to compel plaintiff to comply with discovery demands and to attend a subsequent vocational rehabilitation review.

Plaintiff alleges in his verified bill of particulars, that as a result of his accident on September 2, 2008, his injuries include a herniated disc at L5-S1, with nerve root compression; right-sided disc herniation at L4-L5; right-sided sciatica due to herniated disc at L5-S1; lower back muscle spasm with inability to fully forward flex the spine; and that he had required a surgical L5-S1 hemi-laminotomy, foraminotomy, and discectomy. Plaintiff alleges that these

injuries resulted in pain, swelling, tenderness, limitation of motion, impairment of function involving the skin, bone, muscle, cartilage, ligaments, tendons, joints, blood vessels, nervous system, lymphatic system and other tissues of the affected surrounding area. Defendants maintain that they have previously served demands for authorizations on plaintiff on October 28, 2009, November 5, 2009, and January 6, 2010, that several of the authorizations which were requested were objected to by plaintiff, and that the need for these authorizations was addressed at a compliance conference with the court.

CPLR 3101 (a) requires the full disclosure of all information that is material and necessary to the defense or prosecution of an action. "The words, 'material and necessary,' are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 (1968). Here, several of the requests which defendants make for authorizations, may lead to the production of information which is material and necessary.

Defendants previously requested an authorization from Dr. Frank Iannetta, plaintiff's primary physician. Defendants argue that plaintiff testified at his deposition that he may have pulled a muscle in his back in the 2000's, and that he did not recall whether he saw a doctor regarding this problem. The First Department has held that "in order for a party to obtain discovery of records relating to another party's physical or mental condition, the moving party . . . must first demonstrate that the other party has affirmatively placed his or her physical or mental condition in controversy." *Aycadi v Baron*, 302 AD2d 313, 313 (1st Dept 2003).

Here, to the extent that plaintiff visited Dr. Iannetta for a pulled back muscle, such

information may be relevant because plaintiff's alleged injuries from his September 2, 2008 accident include herniated discs, back muscle spasms, limitation of motion, and impairment of functionality. Also, plaintiff's testimony is vague as to his recollection of when this injury occurred and to the level of treatment he received. Therefore, plaintiff must provide authorizations from Dr. Iannetta for records discussing any treatment of a pulled back muscle, within 30 days of notice of entry of this order.

Defendants also request authorizations related to an injury which plaintiff suffered as a result of a motorcycle accident. Plaintiff testified that in February of 2005 or 2006, he fell off of a motorcycle which he was driving and hit the ground. As a result of this accident, plaintiff broke his collarbone. The court will compel plaintiff to provide authorizations for treatment related to this accident because plaintiff alleges injuries which may be related to this prior injury, including swelling, limitation of motion, and impairment of function involving the bone, muscle, cartilage, ligaments, tendons, joints, and blood vessels. This authorization must be provided within 30 days of notice of entry of this order.

Defendants request an authorization from Dr. Goodkin who treated plaintiff for acromegaly from a pituitary tumor which was surgically removed in 1982, an authorization for an eye injury that occurred in 2007 or 2008 when plaintiff got grease in his eye, and an authorization for records for a punctured eardrum from 2003. Although defendants request these authorizations, they fail to explain how plaintiff's back and muscle injuries would require the disclosure of authorizations for the removal of a tumor, an eye injury, and an ear injury. Defendants do not submit an affidavit from a doctor or expert linking plaintiff's alleged past injuries and surgery to his current complaints of a back injury, nor is there any suggestion that

these prior injuries and surgery contributed to plaintiff's accident. Therefore, without any medical support, the request for these authorizations is denied.

Defendants also request a second vocational rehabilitation analysis. Defendants submit an affidavit from Peter D. Capotosto, a certified rehabilitation counselor and board-certified disability analyst, who examined plaintiff for the purpose of conducting a vocational rehabilitation analysis. Mr. Capotosto states that upon the advice of his attorney, who was present at the examination, plaintiff declined to cooperate. Mr. Capotosto outlines what was expected of plaintiff during his examination, and maintains that plaintiff's refusal to cooperate with the written tests, negatively affected the accuracy and thoroughness of the evaluation.

Plaintiff's counsel does not explain why objections were made at the examination and fails to provide any reasons for why he did not permit his client to answer questions. Although plaintiff contends that this request for another examination is untimely, this motion was served while discovery was pending and before the note of issue was filed. Therefore, because plaintiff's counsel does not provide any explanation as to why he did not allow his client to fully complete the examination, the court will permit a subsequent vocational rehabilitation examination, which must be completed by September 30, 2011.

Finally, although the note of issue was filed on March 15, 2011, a large amount of discovery remains to be completed, including the exchange of records and authorizations, a further deposition of Mr. Price, and a second vocational rehabilitation examination of plaintiff. Therefore, the court will vacate the note of issue, and the note of issue must be filed on or before October 3, 2011. There will be no adjournments of the above dates without prior court approval.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that the motion to compel a further deposition of witness Mark Price is granted. The deposition must be conducted by September 30, 2011, and the court requests that counsel for both parties review the preserved deposition transcript so that they are aware of what questions were previously asked and answered. There will be no adjournment of the deposition without prior court approval; and it is further

ORDERED that defendants' motion to strike plaintiff's complaint for failure to comply with discovery demands for medical authorizations is denied; and it is further

ORDERED that defendants One Bryant Park LLC, One Bryant Park Development Partners LLC, The Durst Manager LLC, and Tishman Construction Corporation of New York's motion to preclude plaintiff from offering evidence of his injuries at trial is denied; and it is further

ORDERED that the motion to compel plaintiff to comply with defendants' discovery demands and to cooperate fully with the vocational rehabilitation expert's review is granted, ~~and~~ ~~part~~, and plaintiff is to provide authorizations for Dr. Frank Iannetta for his treatment of a pulled back muscle, and authorizations for his 2005 or 2006 motorcycle accident in which he broke his collarbone, within 30 days of notice of entry of this order; and plaintiff is to attend a vocational rehabilitation examination which must be conducted by September 30, 2011; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to strike the case from the trial calendar and make all

required notations thereof in the records of the court; and it is further

ORDERED that by October 3, 2011, the plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and statement of readiness and payment of the fee therefor.

Dated: 8/18/11

ENTER: *Lu*
J.S.C.

LOUIS B. YORK
J.S.C.

FILED

AUG 24 2011

NEW YORK
COUNTY CLERK'S OFFICE